Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	**PR Docket No. 89-552**
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	**GN Docket No. 93-252**
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j) of the Communications Act-Competitive Bidding, 220-222 MHz	)	**PP Docket No. 93-253**

To: The Commission

PETITION FOR RECONSIDERATION
OF SMR ADVISORY GROUP L.C.

By: Laura C. Mow
Rufus C. Taylor, III
GARDNER, CARTON & DOUGLAS
1301 K Street, N.W.

Suite 900, East Tower
Washington, D.C. 2000
(202) 408-7205

Its Attorneys

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SUMMARY

The Third Report adopts new rules to govern existing and new licensees in the 220 MHz Service. SMR Advisory Group, L.C. ("SMR Advisory"), as a manager of some eighty-five (85) constructed Phase I systems and a potential bidder for Phase II licensees, supports the FCC's efforts to improve efficiency in the licensing process, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of the 220 MHz Service in the mobile services marketplace. Any new rules in this service, however, must treat all licensees -- Phase I and Phase II alike -- fairly and in a non-discriminatory manner.

The FCC's adopted interference standard is deficient both as a technical and a legal matter. From a technical perspective, the 38 dBuV/m contour employed by the FCC as the protected contour for Phase I licensees severely underestimates actual service coverage. The commenters addressing this issue unanimously opposed the FCC's continued use of this measurement, with most commenters (including SMR Advisory) recommending that the FCC utilize a 28 dBu protected contour. These commenters drew upon actual operating experience in concluding that the 38 dBu protected contour proposed by the FCC failed to protect actual service to customers. The FCC ignored this evidence, choosing instead to remain with its theoretical (and inaccurate) measurement.

As a legal matter, the FCC's refusal to use the interference protection standard more reflective of actual service coverage is inconsistent with its actions in other proceedings in which it adjusted the interference protection criteria to account for service actually be provided to customers. Although the FCC attempted to justify its more restrictive treatment of Phase I 220 MHz licensees, these efforts do not withstand scrutiny. The FCC is required to treat similarly

situated licensees in a consistent manner. To the extent that actual service coverage warrants an adjustment of the interference protection to incumbent licensee, the FCC has established in other proceedings that such licensees are entitled to increased protection from new licensees.

The Third Report also fails to adopt any procedures by which Phase I licensees may modify their licenses. This action too imposes unreasonable restrictions on Phase I licensees which are not applied to Phase II licensees. The FCC must adopt measures that will afford Phase I licensees maximum flexibility within their designated dBuV/m contour similar to the flexibility afforded Phase II licensees within their geographic areas.

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PETITION FOR RECONSIDERATION OF SMR ADVISORY GROUP, L.C.

SMR Advisory Group, L.C. ("SMR Advisory"), by its counsel and pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), hereby requests that the FCC reconsider certain aspects of the Third Report and Order ("Third Report") in the captioned proceeding.[1/] The Third Report adopts rules to govern the future operation and licensing of the 220-222 MHz band (the "220 MHz Service"), including the extent to which existing 220 MHz system operators -- also known as Phase I Licensees --

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1/ *In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, FCC 97-57 (released March 12, 1997) ("Third Report").

will be protected by new 220 MHz licensees or "Phase II Licensees," and the manner in which Phase I Licensees will be permitted to modify their systems.

I.

INTRODUCTION

SMR Advisory manages some eighty-five (85) 220-222 MHz licensed systems, all of which have been constructed. In addition, SMR Advisory (or an affiliate thereof) intends to participate in the upcoming auction of Phase II 220 MHz licenses to supplement its existing network of Phase I 220 MHz systems. SMR Advisory has actively participated throughout this proceeding to assist the Commission in the formation of a regulatory framework which meets the FCC's expressed goals of improving efficiency in the licensing process, eliminating unnecessary regulatory burdens on both existing and future licensees, and enhancing the competitive potential of the 220 MHz Service in the mobile services marketplace.

The development of Phase I 220 MHz systems has been a difficult process, marked by persistent regulatory hurdles. The first applications for 220 MHz systems were accepted in May 1991. Following the acceptance of some sixty thousand (60,000) applications, the FCC imposed a freeze on the filing of additional applications, effective May 24, 1991, which extended to the filing of any modifications to existing applications or licenses.[2/] The freeze on modifications remained in place for five years, and was not lifted until January 1996, when the Commission

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2/ *Acceptance of 220-222 MHz Private Land Mobile Radio Applications*, Order, 6 FCC Rcd 3333 (1991) ("220 MHz Freeze").

adopted rules to permit limited relocations of existing stations.[3/] In addition, the FCC has yet to permit the consolidation of more than one license within the same forty-mile geographic area, even though similar restrictions already have been eliminated in comparable services.[4/] Despite these challenges, however, over 1,000 Phase I systems have been constructed and millions of dollars invested in the industry to date. Moreover, these operators have now aggressively moved to add subscribers to these systems and project substantial growth for their Phase I systems in the months to come.

The FCC's restructuring of the 220 MHz Service was prompted, in part, by certain legislative directives to establish regulatory parity among substantially similar mobile services.[5/] Accordingly, the rules adopted by the FCC in the Third Report must be scrutinized in light of actions taken by the FCC in other services likely to be competitive with the 220 MHz service to

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3/ *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Radio Services, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 11 FCC Rcd 38 (1996) ("220 MHz Second Report and Order"). While the 220 MHz Second Report and Order permitted licensees to relocate to sites within a short distance from the originally-authorized locations (generally 8 kilometers), the Commission refused to allow any modifications to the originally authorized ERP levels, even if the originally authorized ERP was well below the maximum level permitted by the rules.

4/ See, e.g., *CMRS Third Report and Order*, 955 Rcd. 7988 at para. 105 (1994) (eliminating the 40 mile rule for 800 and 900 MHz SMR); see also 47 C.F.R §627(b). On November 19, 1996, the Commission did issue a Public Notice in which it requested comment on the elimination of Section 90.739 of the Rules. See Public Notice, *Commission seeks Supplemental Comment on Request to Eliminate 40-Mile Rule for 220 MHz Radio Service*, FCC 96-448, released November 19, 1996. The comments, which were filed on an expedited basis on December 10, 1996, unanimously supported the elimination of this rule. As no action has yet been taken on this matter, Phase I operators have not yet been permitted to begin the process of true consolidation to prepare for the upcoming Phase II auctions.

5/ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002 (b)(2)(A), 6002(b)(2)(B), 107 Stat. 312 392 (1993) (the "Budget Act").

ensure fair treatment of similarly situated licensees. In this regard, the FCC has modified the rules relating to licensing, application procedures, and service and technical parameters in the 220 MHz Service to better enable 220 MHz operators to compete with providers of substantially similar services. In the 220 MHz Service, like the other services considered by the Commission during the past few years, there are a substantial number of incumbent licensees with operating systems and paying subscribers. While SMR Advisory welcomes the FCC's efforts to update the regulatory restructure of the 220 MHz Service and to license all areas not currently being served by the Phase I licensees, any such rules must adequately account for the systems already constructed and serving customers. The FCC has carefully protected the rights of incumbent licensees in revising the rules governing other potentially competitive mobile radio services, including the specialized mobile radio service in the 800 and 900 MHz bands and the cellular mobile radio services. The 220 MHz Phase I licensees deserve equal consideration.

In the Third Report, the FCC addressed two issues affecting Phase I licensees which are the subject of this Petition. First, the FCC adopted criteria by which a Phase II licensee must protect incumbent licensees based on a requirement that the Phase II licensee must provide at least 10 dB protection to the 38 dBuV/M contour of Phase I stations. Second, the FCC declined to adopt any procedures by which Phase I licensees may further modify their licenses. These actions, in SMR Advisory's view, are unsupported by the record in this proceeding, are contrary to the public interest, and are inconsistent with actions taken with respect to incumbent licensees in substantially similar mobile radio services.

II.

DISCUSSION

A. The Adopted Interference Protection Standard Is Technically Inadequate and Legally Deficient.

In the Notice of Proposed Rule Making in this proceeding, the FCC proposed to permit all Phase II licensees to locate their land mobile or paging base stations or fixed stations at least 120 kilometers from the base stations of co-channel Phase I licensees with no further showing of interference protection to the Phase I licensee. [6/] The FCC further proposed to allow Phase II licensees to locate their stations at distances less than 120 kilometers from the Phase I station upon submission of (i) a technical analysis demonstrating at least 10 dB protection to the 38 dBuV/m contour of the Phase I licensee's station; or (ii) the Phase I licensee's consent to the closer spacing.[7/]

The commenters addressing this issue were unanimous in their opposition to the FCC's proposed interference protection standard.[8/] Whatever their approach to the protection issue, each

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6/ *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding 220-222 MHz*, PP Docket No. 93-253, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 188 (1995) ("Third Notice").

7/ Presumably, a Phase II licensee located 120 kilometers or more from the Phase I licensee's base station would not be required to make any showing of interference protection, regardless of the level of actual interference protection to the Phase I licensee.

8/ See, e.g., E.F. Johnson Comments, at 7; American Mobile Telecommunications Association Reply Comments at 2-3; SMR Advisory Group Reply Comments at 8; U.S. Mobilcomm Reply Comments at 1; Securicor Reply Comments at 5; ComTech Comments at 14-15; Incom Comments at 5; Incom Reply Comments at 2.

of the commenters clearly believed that the Commission's reliance on the 38 dBu contour as the most accurate depiction of reliable service in the 220 MHz Service was simply wrong. This belief was based on actual operating experience compiled by system operators as their systems were constructed and commenced operations. In fact, based on this actual operating experience, SMR Advisory, as well as other operators in the industry, concluded that the reliable service contour actually being provided was a 28 dBu contour rather than a 38 dBu contour and that the appropriate protection standard was one that would require the Phase II operator to provide 10 dB protection to the Phase I licensee's 28 dBu contour. Based on the real world data compiled by industry participants, therefore, all of the commenters addressing this issue concluded that the FCC's proposed interference protection standard fell woefully short of adequately protecting existing Phase I service. As further support for adopting a 28 dBu protected contour for Phase I licensees, many commenters cited to FCC action in other services in which the FCC adjusted the protected service area of incumbent licensees based on actual operating experience.[9/]

In adopting its interference protection standard, the FCC essentially discounted all of the record evidence that actual reliable service dictated use of a 28 dBu protected contour. In this regard, the FCC concluded that the commenters' evidence of "reliable service" was not consistent with the methodology employed to provide co-channel protection for incumbent licensees in other auctionable services -- that is, the methodology pursuant to which a high quality signal is provided to about 50% of the locations, 50 percent of the time, within the service

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9/ See, e.g., Comments of Incom at 4-6 (referring to FCC action increasing the protected service area for cellular operators and wireless cable operators).

area of the stations.[10/] To the contrary, however, these commenters do not seek to change the methodology by which the protected service area will be determined, but rather to correct the continued use of an erroneous factor in the application of that methodology in estimating the actual service areas provided by existing 220 MHz systems. In this regard, the FCC's initial selection of the 38 dBu contour as the best indicator of actual signal strength in the 220 MHz Service appears to have been only a best guess estimate with no substantiating technical analysis or actual operating data.[11/] The FCC should change this factor now after having the benefit of actual data accumulated by operating systems and adopt a 28 dBu protected contour.[12/]

The FCC next seeks to distinguish its decisions protecting incumbent licensees in other services in order to justify its more restrictive treatment of 220 MHz Phase I licensees. The rationale employed by the FCC, however, is not persuasive. With respect to its adoption of a

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10/ This methodology is based on the F(50,50) field strength chart for Channels 7-13 in Section 73.699 of the Commission's Rules (Figure 10), with a 9 dB correction factor for antenna height differential. See Third Report, para. 169, n. 299.

11/ In 1989, when first establishing rules for the 220 MHz Service, the FCC proposed that a "maximum size" base station facility transmit an ERP of 200 watts peak envelope power at a HAAT of 90 meters and a maximum mobile power of 20 watts ERP. *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz by the Private Land Mobile Radio Services*, 4 FCC Rcd 8593, 8601 (1989) ("220 MHz NPRM"). In its first Report and Order in the 220 MHz Service, however, that FCC increased the maximum facilities by incorporating a maximum ERP or 500 watts with an HAAT of 150 meters and a maximum mobile power level of 50 watts ERP. See *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, 6 FCC Rcd 2356, 2371 (1991) ("220 MHz Report and Order"). While the FCC acknowledged in the 220 MHz Report and Order that it had increased the service area by at least 10 kilometers (6 FCC Rcd. at 2371), it failed to make any adjustment to the co-channel separation distance and retained the 120 kilometer co-channel distance for channel re-use.

12/ A number of the commenters submitted supporting documentation of their operating data with their comments. SMR Advisory is in the process of compiling even more information in this regard which it plans to have completed by the reply round of pleadings in this proceeding.

new cellular service protection standard, for example, the FCC characterizes its conversion from the 39 dBuV/m contour to the 32 dBuV/m contour as a "fundamental change in methodology" for determining the cellular licensee's Cellular Geographic Service Area ("CGSA") rather than a change from one field strength to another. In that proceeding, however, the FCC first rejected a proposal to base the new CGSA on the outer 39 dBuV/m contours of the cellular system on the grounds that "reliable cellular service is routinely provided with a significantly lower field strength" which would "greatly underestimate [the existing cellular licensee's] actual coverage."[13/] The 32 dBuV/m contour was ultimately selected to define the new cellular protected service area because "that value has been an informal cellular industry standard for reliable service and the handoff threshold."[14/] The FCC's adoption of the new cellular protection standard, therefore, was directly related to its recognition that actual coverage being provided by existing cellular licensees routinely exceeded the 39 dBu contour.

Similarly, the FCC sought to characterize its increase of the protected service area in the "wireless cable service" as an expansion of "the areas within which quality television service signals could be provided," thereby arguing that its actions in that proceeding were not applicable to at least one 220 MHz policy objective that licensees "obtain quality service."[15/] In

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13/ *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 7 FCC Rcd 2449, 2452 (1992) ("Cellular Second Report and Order"). As noted by the Commission, the CGSA originally was defined as an arbitrary line by the FCC drawn on a map; the CGSA was tied, however, to the outer 39 dBuV/m contours of the cellular licensee, since these consolidated contours were required to cover at least 75% of the CGSA.

14/ Id. at 2453.

15/ See Third Report, para. 178.

fact, however, the FCC specifically noted in the wireless cable proceeding that the adoption of the new interference protection standard would "help preserve the rights of previously-proposed and authorized MDS stations after competitive bidding" and that "one of the underlying purposes for the expansion of the geographic interference zone for authorized and previously-proposed MDS stations [was] to protect such stations."[16/] Whether the objective is expressed as enabling licensees (including, presumably 220 MHz licensees) to obtain quality service or as protecting the rights of incumbent licensees, to accomplish either of these objectives, the FCC must ensure that interference to actual existing operations does not occur. The parallel between these two proceedings seems self-evident.

B. The FCC Must Permit Phase I Licensees Full Flexibility To Modify Their Licenses So Long As Their Designated dBuV/m Contour Does Not Change.

In the Third Report, the Commission adopted rules which generally detail the regulatory status of Phase I non-nationwide licensees. The Third Report, however, does not specify the procedures that such licensees must follow in order to modify their authorizations. As the Commission is well aware, with the exception of a carefully circumscribed, one-time modification filing window opened in the spring of 1996, most Phase I licensees have not been permitted to seek Commission approval to modify their systems since 1991. To the extent that

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16/ See *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing User of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service Instructional Television Fixed Service & Cable Television Relay Service*, Second Order of Reconsideration, 10 FCC Rcd. 7074, 7083 (1995). (Emphasis added).

the Third Report continues the "freeze" on the acceptance of applications for modification for Phase I licensees. SMR Advisory urges the Commission to reconsider its action.[17/]

The Communications Act prohibits the Commission from conveying a right to licensees obtaining their authorizations from a competitive bidding scheme that differ from the rights conveyed to existing licensees in the same service.[18/] In this regard, the Third Report adopts rules that convey upon Phase II licensees the unambiguous right to modify their system configuration, provided that operations are maintained within the geographic service area.[19/] Phase I licensees fall under the protection of Section 309 because they are licensees in the "same service" that were not issued pursuant to competitive bidding. Therefore, Phase II licensees cannot be given the right to modify their systems unless that same right is also accorded to Phase I licensees.[20/] The statute plainly requires equal treatment.

The Commission may believe that, because of their smaller licensed service areas, permitting Phase I licensees to modify their system configuration without prior Commission approval would be unworkable. However, this is not the approach the Commission has taken with site-specific incumbents in the two other SMR services which have moved to a competitive

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17/ If the Commission declines to adopt procedures that allow Phase I 220 MHz SMR licensees to modify their authorizations, those licensees would likely be the only land mobile CMRS licensees unable to modify their systems.

18/ 47 U.S.C. § 309(j)(6)(D) (1996).

19/ 47 C.F.R. § 90.763(b) (1997).

20/ Under the current scheme, the disparate treatment is underscored by the fact that Phase I licensees cannot modify at all. Not only can Phase II licensees modify, but they can do so without obtaining prior FCC approval. Thus, the Commission cannot ameliorate its violation of Section 309 of the Act by occasionally opening a filing window for the acceptance of applications for modification.

bidding allocation scheme. For example, in the 900 MHz SMR service, the Commission adopted a rule which permits incumbents to modify, without prior FCC approval, "so long as their original 40 dBu signal strength contour is not expanded."[21/] 900 MHz licensees, depending on their site's parameters, have no greater service areas than incumbent 220 MHz SMR licensees. The Commission also adopted a similar rule[22/] for 800 MHz SMR incumbents, noting that a system which permits an incumbent to modify without harming the geographic licensee "strikes a fair balance between the interests of incumbents and geographic area licensees."[23/] In this proceeding, the Commission's decision not to permit incumbents to modify their authorizations unfairly tilts the scales in favor of the newly-auctioned geographic area licensees. The Commission's unexplained failure to adopt a similar rule for Phase I 220 MHz SMR incumbents is thus without precedent and must be reconsidered.

21/ 47 C.F.R. § 90.667(a) (1996).

22/ 47 C.F.R. § 90.693(a) (1996).

23/ *Amendment of Part 90 of the Commission's Rules to Facilitate the Future Development of SMR Systems in the 800 MHz Frequency Band*, 11 FCC Rcd 1463, ¶ 87 (1995).

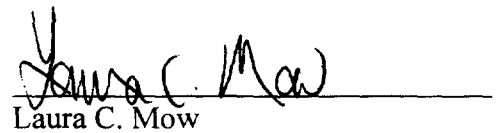
III.

CONCLUSION

Based on the foregoing, SMR Advisory urges the Commission to reconsider its decision in the captioned proceeding and to make changes consistent with the suggestions made herein.

Respectfully submitted,

SMR ADVISORY GROUP, L.C.

By: 

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